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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,		C063761
	Plaintiff and Respondent,	(Super. Ct. No. 07F02708)
v.		
OSCAR BENITEZ JIMENEZ,		
	Defendant and Appellant.	

A jury found defendant Oscar Benitez Jimenez guilty of unlawful possession and carrying a sharp instrument by a prisoner. In bifurcated proceedings, the court found five strike prior allegations (all 1998 second degree robberies) to be true.

Sentenced to state prison for 25 years to life, defendant appeals. He contends: (1) the trial court committed prejudicial error in giving an instruction over defense objection which coerced the jury into breaking the deadlock; (2) the trial court erroneously denied defendant's petition for access to personal juror identifying information; (3) the trial

court committed prejudicial error in failing to inform the jury in response to the jury's question of the option of a hung jury and mistrial; and (4) the trial court erroneously denied his motion for a new trial based on the foregoing claims. We will affirm the judgment.

FACTS

On October 11, 2006, while on patrol as a gunner on an elevated platform, New Folsom State Prison Correctional Officer Arnoldo Hernandez saw three Hispanic inmates search through a laundry bag on a cart and then wheel the cart to a vehicle sally port. One inmate took the bag from the cart and he and the other two inmates sat down next to a wall. Other inmates approached and were given items of clothing. Officer Hernandez was suspicious and advised the yard officer.

An investigation squad went to the yard and discovered numerous weapons in plain sight on some metal tables. The inmates were ordered to the ground and they complied. Defendant was one of the inmates on the ground. The inmates were flex cuffed.

During a patsearch, Correctional Officer Keith Logan rolled defendant over and asked if he had any weapons in his pockets. Officer Logan as well as Correctional Sergeant Wesley Lewis, who stood two feet away, heard defendant say he had weapons. Officer Logan pulled eight sharpened weapons from defendant's pockets. Officer Logan forgot to write in his report about hearing defendant admit to having the weapons but Officer Logan

testified at the preliminary hearing that defendant had so admitted.

Correctional Officer Yvonne Vasquez prepared a diagram with the names of some of the inmates on the yard. She recorded only 21 names out of the 100 inmates on the yard because the inmates were being escorted off the yard as she prepared her diagram. Defendant's name was not on the diagram.

DISCUSSION

I

Instruction To Deadlocked Jury

Defendant first contends that the trial court gave an instruction which coerced the jury into reaching a verdict. We reject this claim.

Prior to deliberations, the court instructed the jury that it "should try to agree on a verdict if you can" and that a verdict "must be unanimous." The jury was given a copy of the instructions.

At 10:53 a.m. on June 15, 2009, the jury retired to commence deliberations but instead took a break and did not begin deliberations until 11:20 a.m. After lunch, at 1:30 p.m., the jury resumed deliberations. At 3:57 p.m., the jury asked a question about Sergeant Lewis's testimony and a part of his testimony was read back in the jury room. At 4:30 p.m., the jury adjourned for the day.

At 9:15 a.m. on June 16, 2009, the jury resumed deliberations. At 9:43 a.m., the jury requested a read back of Officer Logan's testimony. At 11:25 a.m., the jury asked, "If

we cannot reach a unanimous guilty verdict, do we have to render a verdict of not guilty?" The trial court responded that the verdict had to be unanimous whether guilty or not guilty. The trial court denied defense counsel's request that the jury be instructed that if it was unable to reach a verdict, that the case could conclude as a deadlocked or hung jury. At 11:53 a.m., the jury asked, "What do we do if we cannot reach a unanimous verdict?" At 1:42 p.m., the court met with the jury in the courtroom and the foreperson, Juror No. 3, advised that the jury was deadlocked. The court commented that the jury had deliberated for several hours but not for a long time. The presiding juror stated that there had been 5 to 10 show of hands, not an actual ballot, as to the verdict. The last show of hands was six to six but the breakdown had changed with different votes. Juror No. 3 said nothing could be done to break the deadlock. No juror raised his or her hand in disagreement.

After an off-the-record discussion with counsel, the court gave the following instruction:

"Members of the Jury, it has been my experience that a jury initially reporting it is unable to reach a verdict may nonetheless ultimately be able to arrive at a verdict.

"I don't take lightly the report that you are deadlocked, but in this case I believe it appropriate that you continue to deliberate.

"Your goal as jurors should be to reach a fair and impartial verdict.

"The verdict must be based solely on the evidence without regard to emotional considerations or the consequences of a verdict regardless of how long it takes.

"Your duty is to carefully consider all of the evidence presented at the trial, to discuss your views regarding the evidence and to listen to and consider the views of your fellow jurors.

"In the course of further deliberations, you should not hesitate to reexamine your own views or to request your fellow jurors to reexamine theirs.

"It should be possible to inquire of jurors in the numerical minority as to the reasons upon which their opinions are based.

"This should be done in a respectful and dignified manner.

"Likewise, jurors in the numerical majority may also be required to explain their own opinions.

"You should not hesitate to change a view you once held if you are convinced it is wrong or to suggest that other jurors change their views if you are not convinced they are wrong.

"Fair and effective deliberations require a frank and forthright exchange of views.

"As I previously instructed, both the People and the defendant are entitled to the individual judgment of each juror.

"Each of you must decide the case for yourself but your decision should be made only after full consideration of all of the evidence with your fellow jurors.

"It is your duty as jurors to deliberate with the goal of arriving -- arriving at a verdict on the charge if you can do so without violence to your individual judgment.

"You have absolute discretion to conduct deliberations in any way you deem appropriate.

"However, since you have not be[en] able to arrive at a verdict using methods you have chosen so far, may I suggest that you consider changing those methods at least temporarily and try new methods.

"For example, you may wish to consider having different jurors lead the discussion for a period of time or you may wish to experiment with reverse role playing by having those on one side of an issue present and argue the other side's position. This might enable you to better understand the other's positions.

"By suggesting changes in your method of deliberations I want to stress I am not dictating how to conduct your deliberations. I am just saying that you may find it productive to do whatever is necessary to insure each juror has a full and fair opportunity to express his or her views and understand the views of the other jurors.

"I hope my comments and suggestions are of some assistance.

"You are ordered to continue your deliberations at this time.

"If you have other questions, concerns, requests or any communications you desire to report to me, please put them in

writing on the form the bailiff has provided to you signed and dated by your foreperson and sent to me by the bailiff."

The court excused the jury and then stated for the record what had been discussed off the record with counsel. Defense counsel wanted a mistrial, commenting that the deliberations had taken as long as the trial and the jury was split. Defense counsel had objected to the instruction and had asserted that the instruction was not appropriate when the jury was split six to six since there was no majority or minority. The court noted that it had interpreted the jury deliberations as "somewhat fluid" and that deliberations had included "quite a bit of read-back." The prosecutor noted and the court agreed that the facial expressions on some jurors suggested frustration or that he or she did not agree with the numerical breakdown.

At 3:20 p.m. on June 16, 2009, the jury reach its verdict.

Defendant acknowledges that the trial court's supplemental instruction was based on the instruction approved by this court in *People v. Moore* (2002) 96 Cal.App.4th 1105. Defendant argues that "[t]his Court should reverse its decision in *People v. Moore* and hold the instruction coercive." He relies in part on a concurring opinion in *People v. Whaley* (2007) 152 Cal.App.4th 968, criticizing the instruction.¹ Defendant argues the instruction was coercive because the judge erroneously told the

¹ As the People note, *Whaley* held the *Moore* instruction was proper under the circumstances, that is, the jury was split 11 to 1. (*People v. Whaley, supra*, 152 Cal.App.4th at pp. 974-977, 982-984.)

jury that he believed the evidence warranted a verdict ("but in this case I believe it appropriate that you continue to deliberate"), erroneously told the jury that its goal was a verdict, constituting an improper *Allen*² "dynamite" instruction ("Your goal as jurors should be to reach a fair and impartial verdict"), erroneously told the jury that it would deliberate until a verdict was returned ("regardless of how long it takes"), and erroneously admonished the jury ("It is your duty as jurors to deliberate with the goal of arriving . . . at a verdict on the charge if you can do so without violence to your individual judgment"). Defendant argues the remainder of the instruction did not mitigate the coercive nature of the foregoing language. For example, defendant claims the instruction failed to tell the jury that it would be discharged if it could not reach a verdict. He further argues that the court's inquiry into the numerical breakdown of the jury "also coerced the jury in violation of [his] right to due process of law." Defendant claims the court's coercion of the verdict violated his right to a jury trial and Penal Code section 1140 (jurors discharged where court determines "there is no reasonable probability that the jury can agree").³

² *Allen v. United States* (1896) 164 U.S. 492 [41 L.Ed. 528].

³ Penal Code section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as

For the reasons stated in *Moore*, we reject defendant's complaints about the supplemental instruction. (*People v. Moore, supra*, 96 Cal.App.4th at p. 1121.) The supplemental instruction did not require the jury to reach a verdict (the jury "may . . . be able to arrive at a verdict"). In context, the court referred to the relatively short time the jury had been deliberating and concluded that it was "appropriate" for it to continue. A reasonable jury would understand that if it deliberated longer and was still deadlocked that it would no longer be "appropriate" to continue. The trial court had previously instructed that the jury's goal was to reach a verdict if possible and that a verdict "must be unanimous." The court's supplemental instruction, reminding the jury of its duty, did not amount to coercion. (See *People v. Sheldon* (1989) 48 Cal.3d 935, 959-960.) Read in context, the court advised the jury that the verdict must be based on the evidence and not emotion "regardless of how long it takes" which simply advised that the jury was to reach a fair and impartial verdict. The presiding juror advised that the vote had changed on a different show of hands. When the court gave the supplemental instruction, the jury was split six to six so there would have been no impermissible pressure under the circumstances with "reverse role playing." (*People v. Whaley, supra*, 152 Cal.App.4th at pp. 982-983; *People v. Gainer* (1977) 19 Cal.3d

the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

835, 852.) Further, the court reminded the jurors that each was entitled to his or her individual judgment and the court was just making suggestions on how the jury might arrive at its goal of a verdict "if you can do so without violence to your individual judgment." Under the circumstances, the court's inquiry into the numerical breakdown did not result in impermissible coercion. (See *Ellis v. Reed* (4th Cir. 1979) 596 F.2d 1195, 1200; *People v. Morris* (1991) 53 Cal.3d 152, 227, & fn. 21.) And the court's supplemental instruction did not constitute an *Allen* charge. (See *Whaley*, at p. 984.)

II

Access To Juror Information

Defendant next challenges the trial court's denial of his petition for access to personal juror identifying information which he sought in order to investigate whether there was a basis for a new trial motion on the grounds that the jury felt compelled to reach a verdict due to the supplemental instruction as well as juror misconduct (verbal assaults by the guilty vote jurors on the not guilty vote jurors). We find no abuse of discretion.

Defendant filed a petition for access to personal juror identifying information with a declaration from Juror E. W. who stated that he changed his vote from not guilty to guilty "solely" because he believed, after receiving the supplemental instruction, the jury would be required to deliberate until a verdict was reached. E. W. stated his belief that several other jurors voted guilty for the same reason despite believing there

was insufficient evidence. E. W. claimed that he observed a female juror "visibly upset or crying" when the jury "decided to return a unanimous guilty verdict" and that "[s]he had been one of the jurors who had thought that the evidence was insufficient for a guilty verdict." E. W. complained that the jurors who believed defendant was guilty were "quite aggressive vocally to the extent of insulting and belittling [E. W.] (and other jurors) about [his] position" that there was insufficient evidence. Defendant claimed that E. W.'s declaration demonstrated good cause for further investigation, arguing there was possible jury tampering and misconception amongst the jurors. The prosecutor opposed the petition.

In denying defendant's petition, the trial court held E. W.'s declaration was inadmissible under Evidence Code section 1150⁴ other than his statement that the court gave a supplemental instruction during deliberation. The court determined that the supplemental instruction was consistent with that approved in *People v. Moore, supra*, 96 Cal.App.4th at page 1105. We review

⁴ Evidence Code section 1150 states: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

the trial court's ruling for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

A defendant may petition the trial court for access to the personal identifying information of jurors based on facts sufficient to establish good cause for the release of the information. (Code Civ. Proc., § 206, subd. (g) ["[t]he court shall consider all requests for personal juror identifying information pursuant to [Code Civ. Proc., §] 237"]; *id.* § 237, subd. (b); *People v. Wilson* (1996) 43 Cal.App.4th 839, 852.)

People v. Rhodes (1989) 212 Cal.App.3d 541 discussed the competing policy interests regarding access to juror information and developed the following test which applies to the current statutory requirement:

"[U]pon timely motion, counsel for a convicted defendant is entitled to the list of jurors who served in the case, including addresses and telephone numbers, if the defendant sets forth a sufficient showing to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial. . . .

"Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information as a matter of right in each case." (*People v. Rhodes, supra*, 212 Cal.App.3d at pp. 551-552; see *Townsel v.*

Superior Court (1999) 20 Cal.4th 1084, 1093-1095; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990 ["the *Rhodes* test survived the [subsequent statutory] amendments"].)

A jury's verdict may not be impeached by inquiry into the "jurors' mental processes or reasons for assent or dissent"; evidence of how a juror "understood the trial court's instructions is not competent." (*People v. Steele* (2002) 27 Cal.4th 1230, 1261; see also Evid. Code, § 1150 ["no evidence is admissible . . . concerning the mental processes by which [a verdict] was determined"].)

We find no abuse of discretion here. The information contained in E. W.'s declaration relate to the subjective reasoning of the jurors and how they understood the trial court's supplemental instruction. The declaration falls within the category of evidence which may not be used to impeach a verdict, that is, evidence of the jurors' mental processes. (See *People v. Stevenson* (1970) 4 Cal.App.3d 443, 444-445 [juror affidavit which stated juror voted guilty despite being one of few favoring acquittal because he believed jury had to return unanimous verdict and further deliberations were pointless; court found statement inadmissible because it related to jurors' mental processes].) E. W. also claimed he and other jurors who believed the evidence was insufficient were subjected to verbal insults and belittling by other jurors who thought there was sufficient evidence. This allegation is inadequate to show juror misconduct as a matter of law because it is not of such character to have influenced his verdict improperly. (Evid.

Code, § 1150, subd. (a); *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) Defendant misplaces his reliance upon *People v. Hutchinson* (1969) 71 Cal.2d 342 where a juror's affidavit, concerning the statements and overt misconduct of the bailiff which likely influenced the verdict improperly, was admissible to prove the statements and conduct of the bailiff which were objectively ascertainable. (*Hutchinson*, at pp. 346, 351, & fn. 1.)

Here, defendant presented no competent evidence of jury misconduct. Because the purpose for the release of juror information was only to impeach the verdict, E. W.'s declaration was not sufficient to establish good cause for the release. And there was no good cause for release of such information to corroborate E. W.'s claims.

III

Advice Regarding A Hung Jury

Defendant contends the trial court failed to inform the jury of the option of a hung jury. We disagree.

The jury asked, "If we cannot reach a unanimous guilty verdict, do we have to render a verdict of not guilty?"

In discussing how to respond, defense counsel suggested the trial court "include the possibility that if they are unable to reach a decision, that it -- that the case could conclude, I suggested the words a mistrial but something to explain to them that they are not locked here for infinity until whoever, one group, prevailed upon the other group."

The court responded to the jury, "[I]n order to render a verdict of guilty or a verdict of not guilty all twelve of you must be in agreement as to the final verdict."

As defendant acknowledges, as a general rule, the trial court is not required to inform the jury of the consequences of a deadlock. (*People v. Wader* (1993) 5 Cal.4th 610, 664.) He relies upon language from *Gainer*, which he argues suggested that informing the jury was permissible. As the People note, *Gainer* held it was error for a trial court to give an instruction which "states or implies that if the jury fails to agree the case will necessarily be retried." (*People v. Gainer, supra*, 19 Cal.3d at p. 852.) Defendant also rehashes some of his arguments with respect to the supplemental instruction as being coercive. We have already rejected his challenge to the supplemental instruction. Moreover, in the supplemental instruction, the court informed the jury that it should reach a verdict if possible, "if you can do so without doing violence to your individual judgment." The court thus "alluded to th[e] possibility" of a deadlocked jury and "[n]o more was required." (*People v. Butler* (2009) 46 Cal.4th 847, 884.)

IV

Denial Of Motion For New Trial

Finally, defendant contends the trial court erroneously denied his motion for a new trial based on his arguments about the supplemental instruction and release of juror information.

Having rejected defendant's separate challenges to the supplemental instruction and the release of juror information,

we reject his challenge to the trial court's ruling on his new trial motion. (See *People v. Navarette* (2003) 30 Cal.4th 458, 526-527.)

V

Custody Credits

Our miscellaneous order No. 2010-002 (filed March 16, 2010) deems defendant to have raised the issue (without further briefing) of whether the January 25, 2010, amendments to Penal Code section 4019 apply retroactively to his pending appeal and entitle him to additional presentence custody credits. We conclude the amendments apply to all appeals pending as of January 25, 2010. (*In re Estrada* (1965) 63 Cal.2d 740, 745 [amendments lessening punishment for crime apply to acts committed before enactment, provided the judgment is not final]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying *Estrada* to amendment involving custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [involving conduct credits].) The amendments do not operate to modify defendant's entitlement to credit, as he had prior convictions for violent felonies. (Pen. Code, §§ 667.5, subd. (c)(9), 4019, subds. (b), (c).)

DISPOSITION

The judgment is affirmed.

We concur: _____ ROBIE, J.

_____ HULL, Acting P. J.

_____ BUTZ, J.